SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1968

No. 783

D. C. TRANSIT SYSTEM, INC.,
Petitioner

v.

RICHARD A. WILLIAMS, ALFRED S. TRASK, DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA, LEONARD N. BEBCHICK, DANIEL W. GOTTLIEB and WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") entered in the above matter on October 8, 1968.

CITATIONS TO OPINIONS BELOW

The opinions of the Washington Metropolitan Area Transit Commission ("Commission"), printed at pages B-102 and B-121 of the Appendix are reported in 63 P.U.R. 3d 32 (1966) and 63 P.U.R. 3d 45 (1966). The *en banc* opinion of the Court of Appeals, dated October 8, 1968, is unreported as of the date of this petition and is printed at page B-1 of said Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, in making its rates of return determinations without regard to and on bases other than the operating ratio method required by Section 4 of the Franchise and Section 6(a)(4) of the Compact, erred and erroneously decided an important statutory question in a manner which will affect the regulation of motor carriers throughout the United States.

2. Whether the Court of Appeals misconceived its function as a reviewing Court in substituting itself for the Commission in determining the precise amount of return which was just and reasonable, which determination process had been assigned and delegated to the Commission by the Congress and the legislatures of the States of Maryland and Virginia.

3. Whether the Court of Appeals violated fundamental principles of due process by depriving Transit of the return allowed Transit by the Commission without either first finding that the fares authorized by the Commission were unjust and unreasonable, or first giving the Commission the opportunity of making such findings as the Court of Appeals deemed necessary.

4. Whether the Court of Appeals, in determining that Transit was not entitled to rates of return on gross operating revenues of 4.87% and 6.03% in the 1963 and 1965 Rate Proceedings, respectively, rendered a decision which is contrary to and inconsistent with the interpretation by the Supreme Court of Section 6 of the Compact.

5. Whether the Court of Appeals deprived Transit of property without due process of law by allowing Transit a margin of return of only $1,107,000 and $1,550,000, in the 1963 and 1965 Rate Proceedings, respectively.

STATUTES INVOLVED

The statutory provisions involved are Section 4 of Transit's Congressional Franchise, and Sections 6(a)(3) and 6(a)(4) of the Compact. The provisions are printed at pages A-1 and A-2 of the Appendix filed herewith.

STATEMENT OF THE CASE

Petitioner, D.C. Transit System, Inc. ("Transit") is a corporation established under the laws of the District of Columbia on July 9, 1956 and is engaged in the mass transportation of passengers for hire within the District of Columbia and between certain points within the District of Columbia and the States of Maryland and Virginia ("Washington Metropolitan Area") pursuant to a Congressional Franchise, Public Law 84-757, 70 Stat. 598 (1956) ("Franchise").

Prior to the grant of the Franchise, due in large part to a 52 day strike by the bus drivers employed by Transit's predecessor, transit operations in the District of Columbia became so chaotic that the franchise of Transit's predecessor was revoked in July 1955 and the Public Utilities Commission of the District of Columbia was instructed to find a new private operator for the transit system in the District of Columbia. (H.R. Rep. No. 2034, 84th Cong., 2nd Sess. 3-8 (1956); JA p. 368).[1] Various plans were suggested to resolve the transit crisis in the District of Columbia, but it was not until the enactment of the Franchise that satisfactory conditions were agreed upon. Congress recognized that only if an opportunity to earn a reasonable return were assured would private enterprise be willing to provide the mass transportation system needed in the Washington Metropolitan Area. Congress also recognized that the method previously used to determine the reasonableness of the rate of return for motor carriers, *i.e.*, return on system

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[1] "JA" refers to Joint Appendix which formed the record on appeal in the Court below and which is filed with this Court as part of the certified record.

rate base, was inadequate and outdated, and accordingly in the Franchise Congress specifically directed that the operating ratio method of rate determination be substituted for the system rate base method as soon as possible. (S. Rep. No. 1791, 84th Cong., 2nd Sess. 1-3 (1956); H.R. Conf. Rep. No. 2751, 84th Cong., 2nd Sess. 10-13 (1956)). Congress gave effect to its views in Section 4 of the Franchise as follows:

> "It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan Area of an adequate transportation system operating as a private enterprise, the Corporation, in accordance with standards and rules prescribed by the Commission, should be afforded the opportunity of earning such return as to make the Corporation an attractive investment to private investors. As an incident thereto Congress finds that the opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations . . . on either the system rate base or on gross operating revenues would not be unreasonable, and that the Commission should encourage and facilitate the shifting to such gross operating revenue base as promptly as possible and as conditions warrant; and if conditions warrant not later than August 15, 1958."

This case involves applications for authority to increase fares for the transportation of passengers within the District of Columbia, within the State of Maryland, and between the District of Columbia and points in Maryland filed by Transit on December 5, 1962 ("1963 Rate Proceedings") and September 17, 1965 ("1965 Rate Proceedings") with the Commission pursuant to Section 5 of the Franchise and Section 5(e) of Title II, Article XII of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960); 1 D.C. Code § 1410 (1961 ed.) ("Compact"),[2] (JA, Order No. 245, p. 1 and Order No. 563, p. 2).

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[2] All citations to the Compact are to Article XII thereof.

1963 Rate Proceedings

On December 5, 1962, largely as a consequence of its increased labor costs, Transit filed an application for new fares with the Commission. During the course of the hearings held by the Commission in connection with the 1963 Rate Proceedings, Transit proposed that it be allowed a margin of return over and above operating expenses of $1,683,099, representing a rate of return on gross operating revenues of 5.16%, and in support of such proposal introduced considerable evidence sustaining the reasonableness of such return (JA, pp. 99-102; 355-365). However the Commission, in Order No. 245, denied the fares proposed by Transit, and instead authorized fares which would permit Transit a margin of return of only $1,480,746, representing a rate of return of 4.87% on gross operating revenues. (JA, Order No. 245, p. 41).

Thereafter, both Transit and respondents Richard A. Williams ("Williams") and Alfred S. Trask ("Trask") applied for reconsideration of Order No. 245 and, upon denial thereof, filed with the Court of Appeals petitions to review Order No. 245 pursuant to Section 17(a) of the Compact. (JA, p. 1).

On April 8, 1965 the Court of Appeals issued its opinion in *D. C. Transit System Inc. v. Washington Metropolitan Area Transit Comm'n*, 350 F.2d 753, 780 (D.C. Cir. 1965) ("*Transit I*") remanding certain portions of Order No. 245 to the Commission for further proceedings consistent with such opinion because the Commission had failed to provide the Court with an adequate basis for knowing what it did.

On January 26, 1966 the Commission, in response to the mandate of the Court of Appeals in *Transit I*, entered Order No. 563, supplementing Order No. 245, and reaffirmed its findings that a return of $1,480,746, representing a rate of return of 4.87% on Transit's gross operating revenues, was reasonable. (JA, p. 1).

On February 24, 1966 Williams and Trask filed an application for reconsideration of Order No. 563 which was denied by the Commission on March 25, 1966. (JA, pp. 14 and 20). On May 24, 1966 Williams and Trask filed a petition in the Court of Appeals for review of Order No. 563 pursuant to Section 17(a) of the Compact. (JA, p. 27). Thereafter, Transit moved to intervene in that proceeding, and such motion was granted on July 1, 1966. (JA, pp. 27 and 75).

1965 Rate Proceeding

On June 14, 1965 Transit entered into a labor contract with the union representing its employees which was to go into effect on November 1, 1965 for a term of one year. (JA, pp. 124 and 155). As a consequence of the new contract, Transit estimated the increases in wages, salaries and benefits to union and non-union employees for the calendar year 1966 would amount to $1,914,654. (JA, p. 117).

On September 17, 1965, largely due to its increased labor costs and also because Transit had earned a rate of return on gross operating revenues of only 3.23% for the year ended June 30, 1965 (JA, p. 110), Transit filed new tariffs with the Commission requesting authority to increase its fares. Transit proposed that it be allowed a margin of return over and above operating expenses of $2,144,361, representing a rate of return on gross operating revenues of 5.88%, and in support of such proposal introduced considerable evidence sustaining the reasonableness of such return. However, the Commission, in Order No. 564, denied Transit's application for an increase in fares (except for the Downtowner Minibus), finding that the amount of return to be realized by Transit together with a transfer of credits from a special reserve ordered by the Court of Appeals in *Bebchick v. Public Utilities Comm'n,* 318 F.2d 187 (D.C. Cir. 1963), *cert. denied,* 373 U.S. 913 (1963) would provide a margin of return which would be fair and reasonable.

On February 24, 1966 respondents Democratic Central Committee of the District of Columbia ("Central Committee"), Leonard N. Bebchick ("Bebchick") and Daniel W. Gottlieb ("Gottlieb") filed an application for reconsideration of Order No. 564 which was denied by the Commission on March 25, 1966. (JA, pp. 36 and 39). On May 24, 1966 the Central Committee, Bebchick and Gottlieb filed a petition with the Court of Appeals to review Order No. 564, pursuant to Section 17(a) of the Compact. (JA, p. 40). Thereafter, Transit moved to intervene in that proceeding, and said motion was granted on July 1, 1966. (JA, pp. 45 and 75).

On March 1, 1966 Transit filed an application for reconsideration of Order No. 564, claiming that the Commission had failed to grant Transit sufficient increases in fares to cover the margin of return that the Commission found to be fair and reasonable. Essentially it was Transit's position that the disallowance of certain items by the Commission would result in Transit's earning approximately $826,000 less than the amount projected by the Commission. Said application was denied by the Commission on March 25, 1966, and on May 24, 1966 Transit filed a petition with the Court of Appeals for the review of Order No. 564 pursuant to Section 17(a) of the Compact. (JA, p. 63).[3]

On July 1, 1966 an order was entered in the Court of Appeals consolidating the foregoing appeals. (JA, p. 75).

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[3]Transit's appeal from Order No. 564 was Case No. 20,202 below. Transit alleged therein that the Commission erroneously disallowed $252,688 as an operating expense for unreimbursed depreciation on a garage and office building while they had been devoted to public use, and $574,578 in bus maintenance costs. (JA, p. 283; Order No. 564, p. 15). Since the Court of Appeals found for Transit on these items and remanded Case No. 20,202 to the Commission for further consideration, Transit does not seek review of the Court of Appeals decision to the extent it applies to Case No. 20,202.

Opinion of the Court of Appeals

The Court of Appeals rejected the margin of return of $1,480,746, representing a rate of return of 4.87% on gross operating revenues, found by the Commission in Order No. 563 (relating to the 1963 Rate Proceedings) to be reasonable. (A, pp. B-9, B-24 and B-25.)[4] It likewise rejected the margin of return of $2,000,000, representing a return on gross operating revenues of 6.03%, found by the Commission in Order No. 564 (relating to the 1965 Rate Proceedings) to be fair and reasonable. (A, p. B-82).

After expressly stating that it did *not* hold that the fares authorized by the Commission in the 1963 and 1965 Rate Proceedings were "unjust or unreasonable as a matter of law," the Court of Appeals nevertheless proceeded to reject the findings of the Commission and substitute therefor the proposals advanced by the respondents. (A, pp. B-34 and B-35.)[5] This was done without any finding by the Court of Appeals that the return proposed by respondents was just and reasonable. (A, pp. B-40 and B-41.) In addition to the egregious error of substituting its findings for those of the Commission, the Court compounded the error by failing to apply the operating ratio method of rate determination required to be applied by Section 4 of the Franchise and Section 6(a)(4) of the Compact.

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[4] "A" refers to the Appendix filed concurrently with the petition for a writ of certiorari, as required by Rule 23 of this Court.

[5] Unless otherwise indicated, the term "respondents" includes all respondents herein except the Commission.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Involves an Important Question of Statutory Interpretation Which Affects the Regulation of Motor Carriers Within the District of Columbia, the States of Maryland and Virginia, and Throughout the United States.

A. The Decision of the Court Below Is in Conflict with the Laws Governing the Regulation of Motor Carriers in the District of Columbia and the States of Maryland and Virginia in that It Fails To Apply the Required Operating Ratio Method of Rate Making.

1. *The Franchise and the Compact require that the operating ratio method of rate making be used by the Commission.*

Section 4 of the Franchise provides as follows:

> "As an incident [to the opportunity of earning such return as to make the Corporation an attractive investment to private investors] the Congress finds that the opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on either the system rate base or on *gross operating revenues* would not be unreasonable, and that the Commission should encourage and facilitate the *shifting to such gross operating revenue* base as promptly as possible and as conditions warrant; and if conditions warrant not later than August 15, 1958." (Emphasis supplied.)

Section 6(a)(4) of the Compact states:

> "[T]he opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on *gross operating revenues*, shall not be considered unreasonable." (Emphasis supplied.)

Section 6(a)(4) of the Compact was intended to reaffirm and reenact Section 4 of the Franchise. *Transit I*, at p. 764.

The reason that Section 6(a)(4) of the Compact omits any reference to a return on "system rate base" is that the Commission's predecessor, the Public Utilities Commission, had adopted the "modern rate-making standard," the operating ratio method, prior to the enactment of the Compact. *Transit I*, at p. 764. See also *Re D. C. Transit System Inc.*, 33 P.U.R. 3d 137 (D.C. Pub. Util. Comm'n 1960); *Re D. C. Transit System Inc.*, 38 P.U.R. 3d 19 (D.C. Pub. Util. Comm'n 1961). The adoption of the operating ratio method by the Public Utilities Commission was the result of the specific directive of Congress in Section 4 of the Franchise which required that:

> "the Commission should encourage and facilitate the shifting to such gross operating revenue base as promptly as possible and as conditions warrant; and if conditions warrant not later than August 15, 1958."

The adoption of the operating ratio method by the Public Utilities Commission constituted the "shifting" to the operating ratio method called for by Section 4 of the Franchise.

Clearly, therefore, both the Franchise and the Compact *require* that the operating ratio method of rate making be utilized by the Commission in determining Transit's rate of return.

2. *Why it was necessary for Congress to require the Commission to use the operating ratio method of rate making.*[6]

The need for the departure from the traditional test of return on investment, as used in the typical non-transit util-

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[6]The operating ratio of a transit company is the ratio of its operating expenses to its total operating revenue; or its operating expenses divided by its operating revenue. Nichols and Welch, *Ruling Principles of Utility Regulation–Rate of Return Supplement A*, p. 338 (1964). See also Wright, *Operating Ratio–A Regulatory Tool*, 51 Pub. Util. Fort., pp. 24-29 (1953). The amount earned over and above the operating expenses, expressed as a percentage of operating revenues, is called the return on gross operating revenues. *Transit I*,

ity, was recognized because of the volatile nature of the operations, especially the expenses, of a transit company. Wright, *Operating Ratio - A Regulatory Tool,* 51 Pub. Util. Fort. pp. 24-25 (1953) ("Wright"); *County Board of Arlington County Va. v. United States,* 101 F. Supp. 328 (D.C. Va. 1951). Thus, *e.g.,* whereas a return of 6% on the capital invested in a non-transit public utility may provide a reasonable return to such company because of the typically large capital investment, it may well be inadequate for a transit company. This is illustrated at p. 24 of Wright as follows:

	Nontransit Utility	Transit Company
Net Plant Investment	$25,000,000	$ 4,000,000
Annual Revenue	10,000,000	10,000,000
Operating Expenses	8,500,000	9,760,000
Return to Investors	1,500,000	240,000

In the illustration both the transit company and the nontransit utility have the same annual revenue and a return of 6% on each of their investments. Yet, if the patronage of the transit company declines, or the expenses increase 2½%, it will be operating at a loss. The nontransit company, however, which typically has no substantial fluctuation in revenues or expenses, can experience a 2½% change and still give its investors a 5% return on their investment.

The importance of the utilization of the operating ratio method of rate making for transit companies and other motor carriers is perhaps best illustrated by the fact that, although not required, such standard has been adopted by the Interstate Commerce Commission ("ICC") and at least

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at p. 760. Thus if a transit company had operating revenues of $100,000 and operating expenses of $95,000, its operating ratio would be 95% and its return on gross operating revenues would be 5%.

ten state regulatory agencies. *County Board of Arlington County Va. v. United States, supra,* at p. 330; Wright. pp. 24-25.

3. *The Court of Appeals did not apply the operating ratio method of rate making*

In reviewing the Commission's determination of what constituted a reasonable rate of return for Transit, the Court of Appeals failed to utilize the operating ratio method of rate making, which method was prescribed by the Franchise and the Compact. Instead of using the operating ratio method, the Court of Appeals reviewed the Commission's determination on the basis of a different standard chosen by the Court and not by Congress. The standard applied by the Court of Appeals is generally termed the cost-of-capital approach to rate making, *i.e.*, a consideration limited to the interest and dividend costs of a company. Nichols and Welch, *Ruling Principles of Utility Regulation - Rate of Return,* pp. 195-199 (1955).

The Court of Appeals concluded that, from the Commission's orders, the Court of Appeals was unable to determine how the Commission found that returns of 4.87% and 6.03%, as computed under the operating ratio method, were just and reasonable. In so concluding, the Court of Appeals ignored the Commission's careful and detailed analysis of Transit's operating revenues and expense requirements, which the Commission had made pursuant to its understanding of *Transit I.* (A, pp. B-105 to 119; B-141 to B-156). After disregarding the Commission's analysis, the Court of Appeals went on to evaluate the evidence on certain subjects it thought important and to ignore the evidence which the Commission (and Transit) thought important. In its opinion, the Court of Appeals looked solely to and based all of its reasoning upon the testimony and evidence concerning the cost of debt and equity capital and it ignored the very considerations which the Court of Appeals had itself spelled out in *Transit I* at p. 779, namely:

> ". . . the capital programs in prospect, what such programs entail in terms of down-payments as well as financing, the cost of borrowing money, working capital needs, the desirable ratio of debt to equity, the incentives required by a stockholder to keep his money in the business and the dividends and growth rates requisite to supply these incentives, the opportunities in these respects provided in comparable businesses, and the related matters which must be prayerfully explored by the conscientious regulator before he can begin to say why he fixed upon 4.87 rather than 6.5 or 3.2."

See also *Re D. C. Transit System Inc.*, 33 P.U.R. 3d 137, 170 (D.C. Pub. Util. Comm'n 1960).

As a result of the application by the Court of Appeals of an erroneous standard of rate making, Transit's margin of return in the 1963 Rate Proceeding was reduced by the Court of Appeals by the amount of $373,746 and its margin of return in the 1965 Rate Proceeding was reduced by the Court of Appeals by the amount of $450,000. (A, pp. B-2, B-37, B-82 and B-97). Furthermore, Transit's rate of return on gross operating revenues was accordingly reduced by the Court of Appeals in the 1963 Rate Proceeding from 4.87% to 3.64% and in the 1965 Rate Proceeding from 6.03% to 4.64%. The rates of return provided by the Court of Appeals are inadequate and do not allow sufficient funds to provide a surplus which would satisfy the standards enumerated by the Court of Appeals in *Transit I*, pp. 778 and 779.

The Court of Appeals erred in failing to use the operating ratio method of rate making as required by the applicable statutes, Section 4 of the Franchise and Section 6(a)(4) of the Compact, and accordingly Transit's petition for a writ of certiorari should be granted.

B. The Court of Appeals Erroneously Decided a Question of Importance in the Regulation and Administration of Motor Carriers Throughout the United States.

1. *The operating ratio method of rate making is used by the ICC in regulating motor carriers subject to the Motor Carrier Act.*

In carrying cut its statutory obligation to set reasonable fares for motor carriers, pursuant to Part II of the Interstate Commerce Act, 49 U.S.C. § 316(i) (the "Motor Carrier Act"), which is identical to the pertinent provisions of Section 6(a)(3) of the Compact, the ICC has adopted the operating ratio method of rate making. *County Board of Arlington County Va. v. United States, supra; Increased Common Carrier Truck Rates in New England,* 43 M.C.C. 13 (1943); *Increased Common Carrier Truck Rates in the East,* 42 M.C.C. 633 (1943); *Middle West General Increases,* 48 M.C.C. 541 (1940). The predominance of the operating ratio method in the determinations by the ICC of a reasonable return is not a matter of choice, but is dictated by the nature of the motor carrier industry.[7] *County Board of Arlington County Va. v. United States, supra,* at p. 330.

Moreover, at least ten state regulatory agencies, with statutory language similar to the Motor Carrier Act, have followed the lead of the ICC and adopted the operating ratio method of rate making. Wright, p. 25 and cases cited.

2. *Importance of the decision of the Court of Appeals in the regulation and administration of motor carriers.*

The ICC has adopted the operating ratio method of rate making as being the method dictated by the nature of the motor carrier industry, *County Board of Arlington County Va. v. United States, supra,* at p. 330, and accordingly the decision of the Court of Appeals affects the regulation and

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[7] This is so even though there is no specific statutory requirement in the Motor Carrier Act, as opposed to the Franchise and Compact, that the operating ratio method be used.

administration of motor carriers throughout the United States.

The decision of the Court of Appeals, disregarding the statute-mandated operating ratio method of rate making and holding that the cost-of-capital method is the appropriate method for prescribing rates of return for motor carriers represents the only decision by a United States Court of Appeals, which Transit has been able to find, on the appropriate standard for determining the rate of return to be allowed to a motor carrier in cases where the operating ratio method is prescribed. Being the highest federal court which has passed upon the subject, its decision will be given great weight by the district courts throughout the United States charged with reviewing the reasonableness of rates prescribed by the ICC,[8] and may in fact be binding on the district courts in certain circuits.[9]

In any event, the administration of the Motor Carrier Act by the ICC will be disrupted because the ICC is faced with conflicting decisions as to the extent to which the operating ratio method of rate making must be qualified and modified by the cost-of-capital method of rate making. Cf. *County Board of Arlington County Va. v. United States, supra,* and the instant decision of the Court of Appeals.

Transit submits that the erroneous decision of the Court of Appeals on the method to be used to determine the rate of return to be allowed motor carriers, affecting as it does such a wide area of public interest, is a further basis for the Supreme Court to grant Transit's petition for certiorari in order that this important issue may be finally settled. See *Miller v. United States,* 357 U.S. 301 (1958); *Unemployment Compensation Comm'n of the Territory of Alaska v. Aragon,* 329 U.S. 143 (1946).

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[8] *G. E. Employees Securities Corp. v. Manning,* 42 F. Supp. 657 (D.C. N.J. 1941), *rev'd on other grounds,* 137 F.2d 637 (3d Cir. 1943); *King v. United States,* 10 F.Supp. 206 (D.C. Md. 1935) *aff'd* 79 F.2d 453 (4th Cir. 1935).

[9] *In re Mercury Engineering Inc.,* 68 F.Supp. 376 (D.C. Col. 1946); *Gustafson v. Fred Wolferman Inc.,* 73 F. Supp. 186 (D.C. Mo. 1947).

II

The Court of Appeals Misconceived Its Function as a Reviewing Court in Substituting Itself for the Commission in Determining the Precise Amount of Return Which Was Just and Reasonable, Which Determination Process Had Been Assigned and Delegated to the Commission by the Congress and the Legislatures of the States of Maryland and Virginia.

The determination of what constitutes a reasonable rate of return for Transit is a matter which the Congress, the District of Columbia and the States of Maryland and Virginia specifically entrusted to the Commission. Franchise, § 5; Compact, § 6, *supra*. In addition, the courts have repeatedly held that such a function is solely within the discretion of an administrative agency. *Eastern Express Inc. v. United States*, 198 F. Supp. 256, 260 (D.C. Ind. 1961), *aff'd* 369 U.S. 37 (1962). An exercise of judgment by the Commission in an area assigned and delegated to it by Congress, the legislatures of two states and the District of Columbia cannot be set aside because the reviewing court might have made a different interpretation were it required to do so. *SEC v. Chenery*, 318 U.S. 80, 94 (1943).

Transit submits that the Court of Appeals substituted itself for the Commission in an area assigned and delegated to the expertise of the Commission. The Franchise and the Compact state that the Commission shall determine whether fares are just and reasonable and shall employ the operating ratio method of rate making in doing so. This the Commission did in accordance with the standards enunciated by the Court of Appeals in *Transit I*.

The operating ratio method, being the standard used by the Commission in determining the reasonableness of the rates allowed to Transit, is the only standard by which the reviewing court can judge whether the Commission was right or wrong. *SEC v. Chenery, supra*, at p. 87. However, the Court of Appeals disregarded the operating ratio meth-

od of rate making and used its own standard, the cost of debt and equity capital to Transit, and thereafter independently determined the rate of return to which it felt Transit was entitled. Although the Court failed to find that there was no substantial evidence to support the findings and conclusions of the Commission, the Court of Appeals substituted the proposal of the respondents for the findings and conclusions of the Commission. (A, pp. B-34, B-35, B-40 and B-41).

The action of the Court of Appeals is unprecedented. Its function is to determine whether there is substantial evidence and a rational basis for the action taken by the Commission. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Rather than limiting itself to this consideration, the Court here proceeded to determine whether there was a substantial foundation *not for the result arrived at by the Commission under the standard required to be applied by the Commission,* but rather for a new and different standard which the Court of Appeals determined it would apply on appeal.

Simply by applying a standard other than that required to be applied by the administrative agency and then determining that there is insufficient evidence under this new standard, reviewing courts could easily reverse the judgment of the "experts." The findings of fact of expert administrative tribunals should not be set aside if supported by substantial evidence. *Universal Camera Corp. v. NLRB, supra.* If the procedure followed in this case by the Court of Appeals is allowed to stand, the entire rationale for the creation of administrative tribunals vested with expertise and for giving their expert decisions the presumption of validity, if based on substantial evidence, will be thwarted. Accordingly, Transit's petition for a writ of certiorari should be granted.

III

The Court of Appeals Violated Fundamental Principles of Due Process by Depriving Transit of the Return Allowed by the Commission Without Either First Finding That the Fares Authorized by the Commission Were Unjust or Unreasonable or First Giving the Commission the Opportunity of Making Such Findings as the Court of Appeals Deemed Necessary.

A. The Court of Appeals Did Not Find the Rates of Return Allowed by the Commission To Be Unjust or Unreasonable.

The Court of Appeals stated in its opinion as follows:

> "In this case, given our conclusion that the Commission failed to apply appropriate criteria, and failed to make the inquiries prerequisite to valid exercise of its rate-setting authority, we could not permit Transit to retain the increased fares, since to do so would be to give legal effect to the Commission's invalid order. *This is so notwithstanding that we have held neither that the Commission lacked power to order a fare increase, nor even that the fares authorized are, as a matter of law, unjust or unreasonable.*" (A, pp. B-33 to B-35; Emphasis supplied).

In other words, because the Court of Appeals found that the Commission failed to apply the new criteria the Court deemed appropriate in establishing fares for Transit, the Court reduced Transit's revenues although the fares authorized and the rates of return allowed were not found to be "unjust or unreasonable." By reducing Transit's revenues the Court of Appeals in effect prescribed what it deemed to be the lawful fares to which it believed Transit was entitled. Transit submits that such a determination violates the fundamental principles of fairness found necessary by the Supreme Court to satisfy the demands of due process of law in that it deprives Transit of property without a find-

ing that Transit was not entitled thereto. *Thompson v. Louisville,* 362 U.S. 199 (1960); *Rochin v. California,* 342 U.S 165 (1952); *American Toll Bridge Co. v. R.R. Comm'n of California,* 307 U.S. 486 (1939).

Moreover, the Court of Appeals assumed unto itself broader regulatory powers than those which were delegated to the Commission by Congress and the legislatures of Maryland and Virginia. Section 6(b) of the Compact provides that fares charged by a carrier may not be changed (absent a request for such change by the carrier) without a hearing and a finding that such fares are unjust or unreasonable. Section 6(b) states as follows:

> "Whenever, upon complaint, or upon its own initiative, and after hearing held upon reasonable notice, the Commission finds that any individual or joint fare in effect for transportation subject to this Act . . . is unjust, unreasonable or unduly preferential or unduly discriminatory, the Commission shall issue an order prescribing the lawful fare, regulation, or practice thereafter to be in effect."

The Court of Appeals, in effect, set aside the fares authorized by the Commission in the 1963 and the 1965 Rate Proceedings without finding that the fares authorized by the Commission were unjust or unreasonable. In this too, the Court of Appeals has violated the fundamental principles of fairness found necessary by the Supreme Court to satisfy the demands of due process of law by depriving Transit of property without a finding that Transit was not entitled thereto. *Thompson v. Louisville, supra; Rochin v. California, supra; American Toll Bridge Co. v. R.R. Comm'n of California, supra.*

B. If the Orders of the Commission Were Not Supported by a Rational Basis the Court of Appeals Was Bound To Remand the Case to the Commission.

As heretofore stated, Transit believes that the Commission did give a rational basis for its conclusions which were based

on the operating ratio method of rate making, whereas the Court of Appeals based its determination on an unauthorized and erroneous standard of cost-of-capital rate making.

Assuming, *arguendo*, that the Commission had failed to provide the rational basis for its decision which the law requires, the proper procedure is to remand the case for further proceedings by the Commission. *SEC v. Chenery, supra; Austin v. Jackson*, 353 F.2d 910 (4th Cir. 1965); *Mississippi River Fuel Corp. v. FPC*, 163 F.2d 433, *rehearing denied* 163 F.2d 450 (D.C. Cir. 1947). Thus in the *Chenery* case, *supra*, the Supreme Court, in remanding the case to the Securities and Exchange Commission, stated at p. 88:

> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

Similarly in *Austin v. Jackson, supra*, at p. 912, the Court, after stating it could not find a rational basis for the agency's decision, stated:

> "As in the case where administrative action cannot be upheld on the reasons the agency has assigned, the court will not state proper reasons and uphold but will remand the case to the agency."

The fact that the Court of Appeals had already remanded the case to the Commission once is no excuse for not following the aforementioned principle. In *Transit I*, the Court of Appeals remanded the proceeding to the Commission for findings concerning:

> ". . . the capital programs in prospect, what such programs entail in terms of down-payments as well as financing, the cost of borrowing money, working capital needs, the desirable ratio of debt to equity, the incentives required by a stockholder to keep his

> money in the business and the dividends and growth rates requisite to supply these incentives, the opportunities in these respects provided in comparable businesses, and the related matters which must be prayerfully explored by the conscientious regulator before he can begin to say why he fixed upon 4.87 rather than 6.5 or 3.2." *Transit I* at p. 779.

Upon remand, the Commission made findings on the above-decided matters called for by *Transit I.* But, in reviewing the remand decision, the Court of Appeals decided that the Commission should have made findings concerning the cost of capital to Transit, an issue which had not theretofore been specifically remanded to the Commission. Rather than setting aside the Commission order, it is clear that the proper procedure for the Court of Appeals to have followed would have been to remand the case once again to the Commission to make the further findings which the Court of Appeals deemed to be necessary. *Communist Party of the United States v. Subversive Activities Control Board,* 277 F.2d 78 (D.C. Cir. 1959), *aff'd* 367 U.S. 1 (1961).

Moreover, even in cases where a court has remanded a case because the agency failed to provide a rational basis for its decision and the court, in reviewing the agency findings upon remand, determines that the agency has not followed the reviewing court's mandate, the proper procedure is to remand the case once again. *Cf. Eastern Central Motor Carriers Ass'n v. United States,* 251 F. Supp. 483 (D.C. Col. 1966).

Accordingly, even if the Court of Appeals were correct in finding that there was no rational basis expressed in the Commission's decision, something which Transit does not concede, the proper procedure was to remand the case to the Commission, not—as the Court did—take upon itself the functions specifically vested in the Commission.

C. The Issue Before the Commission Upon Remand Would Be Whether the Fares Prescribed by the Commission Would Result in Transit Receiving an Unreasonable Rate of Return.

The reason given by the Court of Appeals for not remanding the case to the Commission to determine whether the rate of return allowed Transit was reasonable was that any such determination by the Commission would involve an unauthorized retroactive establishment of rates. (A, pp. B-29 to B-31). The reasoning is completely fallacious. The issue before the Commission on remand would be whether or not the rates of return allowed Transit during the 1963 and 1965 Rate Proceedings were reasonable. If the Commission finds that the rates of return were reasonable and supports such finding with a reasoned decision, its determination must be upheld. *SEC v. Chenery, supra.*

Even if the Commission should decide that Transit is entitled to rates of return other than those originally found by the Commission to be reasonable in the 1963 and 1965 Rate Proceedings, this would not result in retroactively fixing fares but would merely adjust the rate of return to be allowed Transit in the relevant period of time in the same manner as was accomplished by the Court of Appeals. It is for the Commission, not the Court of Appeals, to determine what rates of return are just and reasonable. *SEC v. Chenery, supra.*

Transit submits that the decision of the Court of Appeals violates fundamental principles of due process in that it reduces the rates of return allowed to Transit by the Commission without a finding that such rates are unreasonable. Accordingly, Transit's petition for a writ of certiorari should be granted.

IV

The Determination by the Court of Appeals That Transit Was Not Entitled to Rates of Return on Gross Operating Revenues of 4.87% and 6.03% in the 1963 and 1965 Rate Proceedings, Respectively, Is Contrary to and Inconsistent With the Interpretation by the Supreme Court of Section 6 of the Compact.

Section 4 of the Franchise provides in pertinent part that:

> " . . . a return of at least 6½ per centum . . . on gross operating revenues . . . would not be unreasonable. . . ."

for Transit. Congress reaffirmed Section 4 of the Franchise in the adoption of Section 6(a)(4) of the Compact (*Transit I*, at p. 764) which provides in pertinent part that:

> " . . . the opportunity to earn a return of at least 6½ per centum . . . on gross operating revenues, shall not be considered unreasonable."

In *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n,*[10] the Supreme Court, in interpreting the Compact to determine the scope of the powers of the Commission, found that under Section 6 of the Compact, the Commission " . . . could set whatever fare it found reasonable, *although a profit of 6½% could not be prohibited.*" (Emphasis supplied).

If a "profit of 6½%" cannot be "prohibited," *a fortiorari*, a rate of return which will allow a lesser profit cannot be "prohibited" or set aside as being too high. It is clear from both the Franchise and the Compact, as interpreted by the Supreme Court, that if, as in the instant case, the Commission makes determinations that the anticipated rates of return on gross operating revenues, for the periods

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[10]Page 4 of the slip opinion of the United States Supreme Court, decided by the Supreme Court on November 25, 1968, subsequent to the decision and judgment by the Court of Appeals of October 8, 1968 appealed from herein.

at issue, will be less than 6½%, and if the calculations as to the operating expenses and gross operating revenues used in making such determinations are supported by substantial evidence, the Commission orders allowing Transit rates of return of not more than 6½% on gross operating revenues may not be "prohibited" or set aside.

The Court of Appeals set aside the conclusions of the Commission that Transit was entitled to rates of return of 4.87% and 6.03% in the 1963 and 1965 Rate Proceedings, respectively, on the ground that the Commission failed to give a "rational basis" therefor.

The Court of Appeals did not find that the Commission's calculations of Transit's anticipated operating expenses and revenues were not supported by substantial evidence.

The "rational basis" for rates of return of 4.87% and 6.03% is the statutory mandate from Congress and the legislatures of Maryland and Virginia that rates of return of "at least 6½%" are "not unreasonable," and hence "not prohibited." *Id.*

The decision of the Court of Appeals that Transit was not entitled to rates of return on gross operating revenues of 4.87% and 6.03% is contrary to and inconsistent with the decision of the Supreme Court in *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, supra.* Accordingly, Transit's petition for certiorari should be granted. *Egan v. City of Aurora,* 360 U.S. 514 (1961).

V.

The Court of Appeals Erred in Determining that Transit Should Be Allowed a Return of Only $1,107,000 and $1,550,000 in the 1963 and 1965 Rate Proceedings, Respectively, in that Such Returns Are Confiscatory and Deprive Transit of Property Without Due Process of Law.

The due process clauses of the 5th and 14th Amendments require that Transit be allowed a fair rate of return on the property it devotes to the public interest. U.S. Const. Amends. V and XIV, § 1; *American Toll Bridge Co. v. R.R. Comm'n of California*, 307 U.S. 486 (1939); *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938). The Commission found that a margin of return for Transit of $1,480,746 in the 1963 Rate Proceeding and $2,000,000 in the 1965 Rate Proceeding were fair and reasonable. (A, pp. B-11 and B-89). Transit submits that the record shows that any lesser margins of return would be confiscatory and a deprivation of property without due process of law because the margins allowed by the Commission were considered to be the minimum permissible in light of the risks of Transit's operations and the return allowed regulated utilities with similar risks. (A, pp. B-115 and B-156). Accordingly, the margins of return of $1,107,000 and $1,550,000 allowed by the Court of Appeals in the 1963 and 1965 Rate Proceedings, respectively, are unreasonably low and deprive Transit of property without due process of law.

Moreover, the Court of Appeals accepted the margins of return of $1,107,000 and $1,550,000 advanced by respondents in the 1963 and 1965 Rate Proceedings although there was no consideration by the Court of the reasonableness of the operating revenues and expenses which would be allowed to Transit under respondents' proposals, as well as the other criteria required by *Transit I* to be analyzed in establishing a reasonable rate of return based on gross op-

erating revenues. Although due process may not include the assurance of the right of appeal, when an appeal is granted the proceedings on appeal must accord with common standards of due process. *Griffin v. People of State of Illinois,* 351 U.S. 12, *rehearing denied* 351 U.S. 958 (1956). Transit submits that the allowance of a rate of return by the Court of Appeals without considering the criteria established by it in *Transit I,* on which the Commission and Transit relied, and without affording Transit the opportunity to be heard on the new criteria established by the Court, violates the standards of fundamental fairness necessary to satisfy the demands of due process of law. *Thompson v. Louisville,* 362 U.S. 199 (1960); *Rochin v. California,* 342 U.S. 165 (1952).

CONCLUSION

What the Court of Appeals has done in this case warrants the exercise of the Supreme Court's jurisdiction. Rather than sitting as a reviewing body and determining—under the applicable statutes—whether the Commission's action was supported by an adequate basis, the Court has cast itself as an administrative agency. It has failed to review the Commission's decision in the light of the legislative standard required to be applied by the Commission. Instead, it has substituted its own determinations of what standard the Commission should have applied and then proceeded to usurp the function of the Commission and determine on the basis of this erroneous standard what a reasonable rate of return for Transit should be. It is well established that a reviewing tribunal cannot substitute its findings for those of the authorized administrative agency. Yet that is precisely what has happened in this case. The Court substituted its findings for those of the Commission and its standard for that prescribed by the Congress and the legislatures of Maryland and Virginia.

Moreover, the conflict created by the Court of Appeals as to the standards to be applied in determining the rates of return to be allowed to motor carriers must be resolved by the Supreme Court. In emasculating the operating ratio method of rate making by qualifying and modifying it by the outdated standards of the system rate base and cost-of-capital methods, the Court of Appeals has disrupted and distorted the operating ratio rate making procedure for motor carriers which are applied by the ICC throughout the United States and in ten states as well as in the Washington Metropolitan Area.

For all of the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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